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NO. 933

IN THE

Supreme Court of the United States

October Term, 1966

CHINA UNION LINES, LTD.,, MITSUBISHI INTERNATIONAL CORPORATION, ET AL, LAN JING-CHAU, ET AL, ARMEMENT DEPPE, S.A., ET AL, *Petitioners*

versus

A. O. ANDERSEN & CO., AMERICAN CYANAMID COMPANY, ET AL, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

On Behalf of Respondent, Lucy Duncan, As Independent Executrix, Widow, and Sole Beneficiary, of Houston Pilot, D. O. Duncan, Deceased

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 264 F.2d 769 and 1966 AMC 1653. That opinion is further set out as Appendix A to Petitioner, China Union Lines, Ltd'd. Petition herein.

The opinion of the District Court is reported at 222 F. Supp. 874 and 1965 AMC 901. That opinion is also attached as Appendix D to Petitioner, China Union Lines, Ltd's. Petition herein.[1]

QUESTIONS PRESENTED FOR REVIEW AS MAY PERTAIN TO RESPONDENT, LUCY DUNCAN

Respondent Lucy Duncan, is the widow and sole survivor of Houston Pilot, D. O. Duncan. Pilot Duncan lost his life on November 7, 1961, while assisting in the navigation in the Houston Ship Channel of the Petitioner, China Union Lines, Ltd's. vessel, UNION RELIANCE.

Three separate Petitions for Writs of Certiorari to the Court of Appeals below have been filed with this Honorable Court. Each of the petitioners had an interest in the UNION RELIANCE. Petitioner, China Union Lines, Ltd. was the owner and operator of the vessel. Petitioners, Mitsubishi International Corporation, et al, were the owners or undewriters for damaged or destroyed cargo carried on board the UNION RELIANCE.

Petitioners, Lan Jing-Chau, et al, are the officers and seamen (or their legal representatives) who were injured or lost their lives as a result of the collision.

The petitions of each of the petitioners are somewhat overlapping to the extent that they each seek review of the decisions of the Courts below exonerating the BEREAN

1. An earlier opinion of the Court of Appeals is reported at 306 F.2d 135 and 1963 AMC 1426. The Appeal was from an Interlocutory Decree and involved a District Court Order concerning the Limitation Fund. Respondent, Lucy Duncan, was an Appellant. In view of the later denial by the District Court and Court of Appeals of limitation of liability to Petitioner, China Union Lines, Ltd., hopefully, questions there raised have become moot.

and its owners, Respondent, A. O. Andersen & Co. and the owner of cargo carried on board the BEREAN, Respondent, American Cyanamid Company.

Respondent, Lucy Duncan has no direct interest in questions concerning the alleged liability of Respondents, A. O. Andersen & Co. and American Cyanamid Company.[2] However, Respondent, Lucy Duncan, to the extent permissible, must oppose the granting of any petition for writ of certiorari which would further delay the granting of Final Judgment in her behalf.[3]

Petitioner, China Union Lines, Ltd. admits its liability in its Petition for Writ of Certiorari. It admits that the UNION RELIANCE was on the wrong side of the Houston Ship Channel. It admits that its officers and crew were negligent. Therefore, as to this Respondent, Lucy Duncan, it would appear that the only question to which we should direct our attention would be Petitioner, China Union Lines, Ltd's., question No. 6, presented at page 6 of its Petition, as follows:

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2. Respondent, Lucy Duncan, did not bring suit against the BEREAN or its owners. She did file suit in the District Court against American Cyanamid Company. However, after having heard the evidence before the District Court, Respondent, Lucy Duncan, did not believe that liability of American Cyanamid Company could be established. Having obtained a Decree of Liability for her damages from Petitioner, China Union Lines, Ltd. (as also did Petitioners, Mitsubishi International Corporation, et al, and Lan Jing-Chau) Respondent, Lucy Duncan, did not perfect an Appeal as to liability of Respondent, American Cyanamid Company.

3. Mrs. Duncan has a stipulation as to damage in the amount of $125,000.00 with Petitioner, China Union Lines, Ltd. See, Appendix "A" attached hereto. Over five years have elapsed from the date of the disaster. Of this time, almost three and one-half years have been spent on Appeal of the District Court's Interlocutory Decree of Liability in favor of Mrs. Duncan. At the time of her husband's death, Mrs. Duncan was fifty-four years of age. She will soon be sixty years of age.

"The primary and direct cause of a collision between two ships is found to be the failure of the steering system of one caused by negligence of the ship's electrician. A contributing cause was found to be using only two instead of the ship's four engines to go astern after the steering failed. The owner was denied limitation of liability for failure to instruct the Master and Chief Engineer on the use of four engines, and in thus manning the ship with an incompetent crew.

Can an owner be charged with privity and knowledge of the crew's negligence found to have caused a collision, on the ground that he should have instructed fully licensed officers of many years' experience about matters of ship operation which they testified they were well aware of and which licensed officers were bound to know?"

We respectfully urge that if this question is not to be reviewed by the Court, then the Petition for Writ of Certiorari, as to Mrs. Duncan, should be denied without regard to other questions which have been raised by the various Petitioners.

STATEMENT OF THE CASE

The tragedy of the UNION RELIANCE did not begin with the collision on November 7, 1961. It even had its inception long before the purchase of the vessel by Petitioner, China Union Lines, Ltd. in April and May of 1961.

The vessel was originally built in the United States in 1940. She was christened the USS MORMACLAND. She was a dry cargo vessel with a C-3 type hull (Vol. V—R.1659). She was not a smaller "C-2" type vessel as indicated by Petitioner, China Union Lines, Ltd. at page 22 of its Petition.

The main propulsion system originally installed was still in use on November 7, 1961, even though the ownership, character and service of the vessel had been altered many times.

The main propulsion system consisted of four Busch-Sulzer diesel engines designed to deliver, in combination, a *service speed* of 16.96 knots at 80 rpms. (Vol. V—R.1661).

C-3 type vessels were powered by more efficient steam turbines *with the notable exception of the UNION RELIANCE and three sister ships.* Of these four C-3 vessels powered by four diesel engines, only the UNION RELIANCE was known to still be in operation on the date of collision. (Vol. VIII—R.2978-2980).

The original dry cargo ship, the USS MORMACLAND, was lend-leased to the British, who converted her to a small aircraft carrier, the HMS ARCHER. She was then reconverted to a dry cargo ship under British Registry and renamed the EMPIRE LAGAN. Thereafter, she was converted to a passenger ship of Swedish Registry and renamed the ANNA SALEN. Then, while still in passenger service, she was sold to Greek owners and renamed the TASMANIA. Finally, in April and May of 1961, she was sold to Petitioner, China Union Lines, Ltd. for its use as a dry cargo ship. This was approximately six months before the disaster. She was renamed the UNION RELIANCE. (Ship's Particulars—Ex. P-25-I, received in evidence at Vol. V—R.1658-1662).

At the time of the vessel's purchase, Petitioner, China Union Lines, Ltd's. representative, Mr. King, went to Greece to inspect the vessel. The purchase contract had already been signed.

Mr. King wrote to Petitioner, China Union Lines, Ltd., describing the horrible state of the vessel's engine room and main engines. The only comfort he could give was, that with so many engines, even in their bad condition, it was unlikely that all four would stall at one time. (Ex. P-25-A-1, 2 and 3, received at Vol. VIII—R.2816; also R. 2816-20).

Although it never publicly admitted to the poor condition of the vessel, Petitioner, China Union Lines, Ltd. did complain of the unfair purchase survey by the Lloyds surveyor at Pireaus. The survey was claimed to be biased in favor of the local Greek owners (Vol. VIII—R.2839-40).

Although the vessel was partially surveyed by Bureau Veritas at Pireaus for Petitioner, China Union Lines, Ltd., the steering engine room was not surveyed because it was locked (Ex. P-25-D, received in evidence at Vol. VIII—R.2831). No further effort to survey the steering system was made by Petitioner, China Union Lines, Ltd. and the only inspection made by it consisted of determining that the rudder would move (Vol. VIII—R.2831-2).

The Taiwan officials of Petitioner, China Union Lines, Ltd., claimed to have thought that their Mr. King was exaggerating. Therefore, they decided to await further reports from their crew which was dispatched to Pireaus to take over the vessel (Vol. VIII—R.2843).

The new Master (Captain Fan) and Chief Engineer (Mr. Han) who brought the vessel back to the United States and finally to Taiwan, were the immediate predecessors of Petitioners, Captain Hsu and Chief Engineer, Dah. The latter are the Master and Chief Engineer involved in this litigation.

Captain Fan and Chief Engineer Han, were appalled by the state of mechanical repair of the vessel. Captain Fan even recommended that the Lloyds surveyors be sued (Ex. P-25-P-1, received in evidence Vol. VIII—R.2845; Ex. P-25-Q-1 at R.2849).

Shortly after sailing from Pireaus Captain Fan cabled to Petitioner, China Union Lines, Ltd., as follows:

> ". . . all parts un-normal . . . accidents will seriously expected in maneuvering . . ." (Ex. P-5-M-2 at R. 2855).

Yet under these conditions, the vessel carried cargo to the United States, urged by Petitioner, China Union Lines, Ltd., to ". . . do utmost to maintain engine and speed . . ." (Col. VII—R.2856). The vessel first discharged cargo at Tampa. It then proceeded to New Orleans where the main engine control system was reworked. Some of the needed repairs and reconditioning of the main engines were also performed. After reworking of the engine controls, the vessel was capable of switching from four engines ahead to four engines astern in one minute, *if operated properly.* (BEREAN Ex. 56, received at Vol. VIII—R. 3180; Ex. P-25-J at R.2863; also, testimony at Vol. IX—R.3229-3230).[4]

From New Orleans, Captain Y. H. Chan (Petitioner, China Union Lines, Ltd's. Port Captain) cabled to Taiwan:

> ". . . above repairs absolute minimum for vessel operations. Making every effort postpone remaining re-

4. It is to be noted at R.3229, that Surveyor Spindanger carefully explained the procedures for reversing all four engines to former Chief Engineer Han. This information was never passed on to his successor, Petitioner, Mr. Dah.

pairs Far East or after date . . ." (Ex. P-25-Q-2, received at Vol. VIII—R.2860).

Even after New Orleans repairs, the main engines were still in urgent need of at least fourteen pistonheads. The number four main engine[5] was made a special receptacle for worn-out and homemade parts that had not been replaced (Vol. IX—R.3263).

The UNION RELIANCE limped to Japan and then finally home to Taiwan. All the while she was carrying cargo.

At last, at Taiwan, Petitioner, China Union Lines, Ltd., would surely make the thorough inspections necessary, carry out extensive repairs, and fully advise the new Master and Chief Engineer (Petitioners, Captain Hsu and Mr. Dah) as to how to operate the vessel. Instead it almost literally, walked around, kicked the tires, honked the horn and decided that the vessel was ready to continue to earn its keep.

On August 22, 1961, the new Chief Engineer, Petitioner, Mr. Dah, boarded the UNION RELIANCE (Vol. VI—R.2167). His previous experience as a Chief Engineer on ocean going vessels[6] was limited to 1½ years on the UNION PIONEER, which had one engine (R.2167; 2204) and 1 month on the UNION CAPITOL, which had one engine (R.2167; 2204). The UNION RELIANCE was his first ship with four engines (R.2204).

Petitioner, Mr. Dah, spent one day with Chief Engineer Han, who had brought the vessel from Greece (R.2204).

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5. One of the two engines used for backing power.

6. He had served on a Chinese Customs ship which had two engines (R. 2166; 2204).

Chief Engineer Han did not tell him of any previous difficulties with the engines (R.2204-6). Petitioner, China Union Lines, Ltd., did not tell him about previous difficulties, the need for parts or furnish him with any of the reports which it had received (R.2206-8). He *never* knew that all four engines could be run astern (R.2210-15).

On August 23, 1961, the new Master, Petitioner, Captain Hsu, boarded the UNION RELIANCE (Vol. IV—R.1494; Vol. V—R.1567). The UNION RELIANCE sailed under his command on August 27, 1961 (Vol. V—R.1567). Neither the former Master, Captain Fan or the Marine Superintendent of Petitioner, China Union Lines, Ltd., told him of any previous difficulties (Vol. V—R.1567-8).

Petitioner, Captain Hsu, received only general information from the former Master, Captain Fan, concerning the operation of the vessel's engines (Vol. V—R.1652-4). Petitioner, China Union Lines, Ltd., gave him no instruction as to the operation of the engines (R.1652) even though the UNION RELIANCE was the only four engine vessel it had ever owned (Vol. V—R.1568-9; Vol. VI—R.2204). His only information on utilization of the engines came from the former Greek owners and their log books (Vol. X—R.3816).

Petitioner, Captain Hsu, admitted that four engines astern would give additional power (Vol. X—R.3814), however, he *never* knew that four engines could be used astern (Vol. V—R.1652-4; Vol. X—R.3814-8).

Petitioner, Captain Hsu, was in the steering engine room only one time before the collision and then the vessel was docked and the steering engines were not operating (Vol. IV—R.1572-3).

Petitioner, China Union Lines, Ltd's., Mr. Muh was in charge of the UNION RELIANCE at Taiwan. He was the only witness produced by Petitioner, China Union Lines, Ltd., as to its diligence, lack of privity and knowledge.

Mr. Muh considered all reports concerning mechanical difficulties and needed repairs to have been *exaggerated* (Vol. VIII—R.2843-5).

Mr. Muh had had no experience with a vessel powered by four engines, but as far as he was concerned, ". . . it really does not matter whether she has four, two or one engine" (Vol. VII—R.2932). He did not feel that it was necessary to give any instructions or training to engineering personnel (R.2932).

Mr. Muh testified that one 55 gallon drum of telemotor oil should last a year or more (Vol. VIII—R.2898). One extra drum was on board when the vessel was purchased from the Greeks. He approved purchase of two drums at Tampa and another two drums at New Orleans. Mr. Muh ". . . thought it was rather strange . . ." (Vol. VII—R.2899). Later, when Mr. Muh was inspecting the vessel at Taiwan, he only looked into the steering engine room to see if the rudder moved when the wheel on the bridge was turned. No examination of the steering engines or electrical equipment was made in spite of his prior knowledge that the consumption of telemotor oil was excessive (Vol. VII—R.2783-4).

Thus, manned, equipped and repaired, the UNION RELIANCE sailed (again with cargo) from Taiwan for Los Angeles, Houston and her destruction.

Only four hours out of Keelung, her number three main engine failed and was inoperative all of the way to Los

Angeles (Vol. IV—R.1541). In one thirteen-day period alone she had ten fires in her main engines' exhaust manifolds. These fires continued even after supposed repairs (Engine Log—Ex. P-7, admitted at Vol. VI—R.2170).[7]

The vessel arrived at Galveston Bar inbound toward Houston on November 5, 1961. Houston Pilot, Captain Collie, conned the vessel to Houston. He was advised by the Master, Petitioner, Captain Hsu, that the vessel would make a top speed in open waters of only 11 knots with all four engines on the shaft running at *full ahead*.[8] Petitioner, Captain Hsu, told Pilot Collie that it would take thirty (30) minutes to change one set of engines from ahead to astern for astern power (Vol. VII—R.2742, 3).

Two days later, on November 7, 1961, while sailing outbound from Houston, the vessel's starboard steering engine failed at approximately 9:00 P.M. (Vol. IV—R.1510-11). The vessel's port steering engine or portions of the system apparently failed at approximately 11:10 P.M. (Vol. IV—R.1527 and R.1530), a few minutes before the collision.

Pilot Duncan was burned beyond recognition in the fire that followed the collision.

On November 10, 1961, Petitioner, China Union Lines, Ltd., libeled the BEREAN and its owners, Respondent, A. O. Andersen & Co. In its Libel it stated, under oath, that there was *no* ". . . fault or neglect on the part of the M/V UNION RELIANCE or those in charge of her" (Vol. I—R.2 and 4). Substantially, the same terminology was used in Petitioner, China Union Lines, Ltd's. Petition

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7. The number three and number four engines were those engines used for backing power on the night of the collision.

8. It is to be remembered that the "service speed", not even the maximum speed, was originally approximately 17 knots.

for Exoneration or Limitation of Liability filed in the District Court on November 28, 1961 (Vol. I—R.73-4).

On February 19, 1963, in its Answer to Respondent, Lucy Duncan's, Request for Admissions, Petitioner, China Union Lines, Ltd., indicated that the only fault, if any, of Pilot Duncan was in bringing the UNION RELIANCE too close to her starboard bank in the bend at Beacon 75. It was reasoned that this gave the effect of increased hydraulic force between the vessel and the channel bank, thereby pushing the vessel away from the bank out of control. Such an effect is sometimes called "smelling the bank", "bank sheer" or "suction". (Request for Admissions at Vol. IV—R.1278—Answers at R.1288).

At the start of the principal portion of the trial[9] on March 11, 1963, Petitioner, China Union Lines, Ltd., made its opening statement:

> ". . . we have never been able to determine that there was anything wrong with the machinery on this ship (UNION RELIANCE) and we believe that the sheer was caused by the smelling of the bank; and I see no reason to amend our pleadings, but that's what we think are the true circumstances of the reason why our ship sheered across the channel." (Parenthetical expression added) (Vol. IV—R.1420).

Following trial, Petitioner, China Union Lines, Ltd. filed in the District Court, its "Findings of Fact and Conclusions

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9. In piecing together the complete "facts" it is sometimes necessary to refer to earlier proceedings; most especially the Transcript of Proceedings in the District Court commencing on December 3, 1962 (Vol. II—R.678 through Vol. III—R.1101), which contain testimony of surveyors J. R. Bencal and R. L. Wynne, concerning their employment by Petitioner, China Union Lines, Ltd., both prior to and after the date they were appointed Salvage Master and General Average Surveyor, respectively, by the District Court.

of Law Suggested by Petitioner, China Union Lines, Ltd." This document did not become a part of the Record. Summarized, Petitioner, China Union Lines, Ltd., contended in the District Court that the sole fault of the UNION RELIANCE was that of negligent navigation by Pilot Duncan. Therefore, it was urged that Respondent, Lucy Duncan, should be absolutely barred from recovery. Somewhat the same position was taken by Petitioner, China Union Lines, Ltd. before the Court of Appeals below.

The District Court found that there was ". . . *no* substantial evidence that this ("suction" or "bank sheer") in fact did cause this movement (UNION RELIANCE's crossing to the wrong side of the channel) . . ." (Parenthetical expression added). *See*, Footnote 1 to District Court's Finding of Fact No. 28.

The District Court's Interlocutory Decree of September 3, 1963, held Respondent, Lucy Duncan, to be entitled to recover her full damages from Petitioner, China Union Lines, Ltd., (Vol. XIV—R.5146-7).

Although the District Court heard forty-nine live witnesses, two witnesses by deposition, one by transcript of testimony at a prior Coast Guard Hearing and in addition, examined two hundred thirty-seven exhibits, Petitioner, China Union Lines, Ltd., maintained before the Court of Appeals that all of the District Court's forty-six Findings of Fact pertaining to fault or limitation were in error. It did not prevail.

In its Petition for Writ of Certiorari, China Union Lines, Ltd. has substantially altered its previous positions. For the first time, Petitioner, China Union Lines, Ltd., admits that there was negligence on the part of the officers and crew (not including Pilot Duncan) of the UNION RELIANCE

and that there were at least minor mechanical defects. *See*, Petitioner, China Union Lines, Ltd's. discussions of the Fire Statute (46 U.S.C.A. § 182) and the Limitation of Liability Act, (46 U.S.C.A. § 183, et seq). However, Petitioner, China Union Lines, Ltd. stoutly maintains that it is entitled to limitation of liability (apparently as a matter of law) because it had no personal knowledge of mechanical defects and because it had selected experienced and licensed officers and crew.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

When taken in context with the full Record, the decision in the Court of Appeals below presents no conflict with decisions of this Court or other Courts of Appeal on questions of privity and knowledge.

Petitioner, China Union Lines, Ltd., bases its argument on two assumptions:

(a) Specific finding of crew's negligence precludes the Petitioner from being a party to that negligence.

(b) That having picked "experienced," "licensed" crew members, Petitioner cannot be held to have rendered its vessel unseaworthy by manning it with an incompetent crew.

At the very outset these assumptions completely ignore other findings by the Courts below, as follows:

(a) Petitioner, China Union Lines, Ltd., failed to inspect the steering system of their vessel; that such inspection would have revealed leakage of telemotor oil and use of devices to circumvent fuses; that Petitioner was, through its prior knowledge of many similar defects, on notice that

it should make such inspection (District Court's Finding of Fact No. 31).

(b) That the Captain and Chief Engineer were unaware of the proper use of the vessel's main engines and that the Petitioner, China Union Lines, Ltd., failed to take steps to see that they were familiar with proper operation of the vessel (District Court's Findings of Fact Nos. 32, 33 and 35 combined).

(c) That the telephone communication system on the vessel was inoperative and that in the exercise of due diligence, Petitioner, China Union Lines, Ltd., would have discovered and corrected this deficiency (District Court's Findings of Fact Nos. 34 and 35 combined).

Under our "Statement of the Case," we have referred to the Record at some length in connection with notice to Petitioner, China Union Lines, Ltd., of the many vessel defects and lack of knowledge of its officers as to how to properly run the vessel. Petitioner, China Union Lines, Ltd., had more than ample opportunity to carefully inspect its vessel, to make repairs, to fully instruct its crew in efficient operation of its vessel and to apprise them of prior difficulties. It did none of these things.

In our view, Petitioner, China Union Lines, Ltd., is now asking the Court to construe its prior holdings and those of the Courts below in such a manner that the *only* duty of a vessel owner is to place experienced (in time of service), licensed mariners on board its vessel, without regard to its knowledge not shared with its mariners, without regard to whether its mariners' prior experience is germane to the operation of the particular vessel and without regard to its knowledge or suspicions as to mechanical defects.

Petitioner, China Union Lines, Ltd., has cited three decisions by this Court in support of its views; *Craig v. Continental Insurance Co.*, 141 U.S. 638; 12 S.Ct. 97 (1891); *La Bourgogne*, 210 U.S. 95, 28 S.Ct. 664 (1908) and *Coryell v. Phipps*, 317 U.S. 406, 63 S.Ct. 91 (1943).

We respectfully submit, that even without consideration of other cases, the above do not support its contentions.

In the *Craig* case, supra, the only negligence alleged was that of one Reardon in attempting to tow a vessel. The owners had no knowledge of his appointment. He was held, at most to be "a mere employee." There is no indication that the vessel owners had any knowledge of his actions whatsoever.

In *La Bourgogne*, supra, the only negligence involved was that of the vessels' Master proceeding at an immoderate speed while in a dense fog. This Court clearly limited its holding in *La Bourgogne*, supra, in *The Linseed King*, 285 U.S. 502, 52 S.Ct. 450 (1932), to which further reference will be made.

In *Coryell v. Phipps*, supra, either crew neglect or a latent defect due to age, or both, were involved. Leaking gasoline ignited and caused the vessel to burn. The vessel owner clearly proved that he had had competent persons make frequent inspections for such conditions, but they had gone undetected. At page 412, this Court stated:

> "One who selects competent men to *store* and *inspect* a vessel *and who is not on notice as to any defect in it* cannot be denied the benefit of the limitation. . . ." (Emphasis supplied).

We respectfully submit that the rule in *Coryell v. Phipps*, supra, precludes limitation of liability by Petitioner, China

Union Lines, Ltd., under the facts of this case as found by the Courts below.

In the *Linseed King*, supra, this Court affirmed denial of limitation by the Courts below, stating at page 511:

> "It is said that the Master, admittedly competent had definite and positive instructions not to run through ice; that when he encountered ice on this trip from the New Jersey shore, it became his duty at once to abandon the trip and return to the Edgewater plant. The argument is that as the boat was seaworthy when there was no ice and instructions had been given to a competent Master not to run her through ice, the owner did its full duty and cannot be held responsible as having privity or knowledge of a violation by the Master of these explicit instructions. Cases such as *La Bourgogne*, 210 U.S. 95, 28 S.Ct. 664, 52 L.Ed. 973, which involved the Master's failure to obey rules and instructions when on the high seas and disaster attributable to such fault, are cited. But there is a vast difference between the cases relied on and the instant one. The launch was used for ferriage over a distance of about a mile and a third. It was known to be unseaworthy and unfit if there was ice in the river. There is no analogy between such a situation and that presented in the cited cases where the emergency must be met by the Master alone. In these there is no opportunity of consultation or cooperation or of bringing the proposed action of the Master to the owner's knowledge. The latter must rely upon the Master's obeying rules and using reasonable judgment. The conditions on the morning in question could have been ascertained by Stover, if he had used reasonable diligence, and we think the evidence is adequate to support the finding that the negligence which caused the disaster was with his, and therefore with the owner's, privity or knowledge."

Clearly, an owner may not hide his head in the sand and thereby prove himself to be "without privity and knowledge."

As stated in *Avera v. Florida Towing Corporation*, 322 F.2d 155 (5th Cir. 1963) at page 166:

> 'With the duty to make inquiry "the measure" of the knowledge "is not what the owner knows, but what he is charged with finding out". *Great Atlantic & Pacific Tea Co. v. Brasileiero*, 2 Cir., 1947, 159 F.2d 661, 665, 1947 AMC 306. For "* * * knowledge means not only personal cognizance but also the means of knowledge—of which the owner or his superintendent is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it." *The Cleveco*, 6 Cir., 1946, 154 F.2d 605, 613, 1946 AMC 933."'

In *The Silver Palm*, 94 F.2d 776 (9th Cir., 1937, cert. den. 304 U.S. 616), the Court of Appeals held that the failure of the owner to advise its master of the unusual reversing characteristics of the vessel was sufficient to deny it limitation. The wording of a portion of the opinion had a familiar ring, at page 779:

> "The court below found that the Master of the SILVER PALM, Capt. Cox, did not know of the peculiarity of the Doxford engine at the time of the collision, though he had had command of the vessel for many months. Unless advised, it is entirely possible that a captain would not learn of this condition until he made the unusual emergency maneuver of reversing when going at a high speed ahead. With good luck, a vessel could well make several voyages around the world without requiring such action on his part."

The UNION RELIANCE also might have traveled further without the need of emergency full power astern

from all four engines. Petitioner, China Union Lines, Ltd., however, chose to take such a risk when it did not properly instruct its crew.

Many more cases in the Courts of Appeals could be cited. However, they appear to us to be unanimously in accord with the opinion of the Court of Appeals below.

The Court has always been reluctant to review concurrent findings of fact in the Courts below.[10] We respectfully submit that unless the Court undertakes to reassess the massive evidence against Petitioner, China Union Lines, Ltd., that it should deny the Petition for Writ of Certiorari presented by China Union Lines, Ltd., at least insofar as Respondent, Lucy Duncan, is concerned.[11]

Respectfully submitted,

JOHN V. WHEAT

J. DONALD STILLWELL

10. See: **The Carib Prince,** 170 U.S. 655, 18 S.Ct. 753, 42 L.Ed. 1181 (1898); **The Wildcroft,** 201 U.S. 378, 26 S.Ct. 467, 50 L.Ed. 794 (1905); **Luckenbach v. W. J. McCahan Sugar Refining Co.,** 248 U.S. 139, 39 S.Ct. 53, 63 L.Ed. 170 (1918); **Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.,** 254 U.S. 1, 41 S.Ct. 1, 65 L.Ed. 97 (1920); **Just v. Chambers,** 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903 (1941); **Mahnich v. Southern S.S. Co.,** 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944).

11. We assume that it is possible to separate Respondent, Lucy Duncan, from matters presented by Petitioners, Mitsubishi International Corporation, et al and Lan Jing-Chau, et al. If such is not possible, then we wish to bring one further point to the attention of the Court. If Petition for Certiorari is denied to Petitioner, China Union Lines, Ltd., as to its liability and limitation, then Petitioners, Mitsubishi International Corporaton, et al, and Lan Jing-Chau, et al, will have a Final Decree in their favor against Petitioner, China Union Lines, Ltd., and questions of potential liability of other parties should become moot, since they are entitled to but one recovery.

APPENDIX A

EASTHAM, WATSON, DALE & FORNEY
ATTORNEYS AT LAW
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United States National Bank Building
Cable Address "LOCKTAY"

November 29, 1963

J. Donald Stillwell, Esq.
1925 Bank of the Southwest Bldg.
Houston, Texas 77002

RE: In the matter of the Libel and Petition of China Union Lines, Ltd., owner of the S/S UNION RELIANCE, in a cause of exoneration from or limitation of liability—A.D. No. 2018 (Consolidated)—In the United States District Court for the Southern District of Texas Houston Division

. . . . . .

Claim of Lucy Duncan, Independent Executrix and widow and sole beneficiary of D. O. Duncan, deceased.

. . . . . .

Dear Sir:

This will confirm our agreement that all of the damages of your above client in the captioned matter are stipulated to be a total of $125,000.00 (One Hundred Twenty-Five Thousand and no/100ths Dollars), that you and your client will not be required to make your damage proof before the Court appointed commissioner herein and that you and your client agree that you will not move for a decree

on damages and will not move for or require security in this claim before final determination of the question of liability and issues appealed to appellate courts and return of mandate, and it is further agreed that this is without prejudice to any and all of Petitioner's contentions and defenses made herein or on appeal.

Please note your agreement to the above on a copy hereof and return same to the undersigned.

Yours very truly,

PLATOW & LYON
EIKEL, FLETNER & GOLLER
EASTHAM, WATSON, DALE & FORNEY

By CLARENCE S. EASTHAM
Proctors for Petitioner and Appellant

AGREED TO:

J. DONALD STILLWELL 12/2/63
J. Donald Stillwell
Attorney for Lucy Duncan, Independent Executrix, widow and sole beneficiary of D. O. Duncan, deceased